***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION and E.I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees,

CLENDON H. LEE

Appellant.

Docket Nos. 77-7228 77-7428

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

PETITION FOR REHEARING BY APPELLANT LEE
AND
SUGGESTION FOR REHEARING EN BANC.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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| CLENDON H. LEE, | : | |
| Appellant. | : | |

PETITION FOR REHEARING BY APPELLANT LEE
AND
SUGGESTION FOR REHEARING EN BANC.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Appellant Lee respectfully prays that this Court grant rehearing of this case as determined from the bench January 18, 1978, a copy of which is an Appendix hereto, and respectfully suggests rehearing en banc.

It is respectfully submitted that the panel misapprehended or overlooked at least the following:

I. The panel stated "In Mills there was relief granted whereas here there was no relief obtained at all either by way of injunction or by way of damages."

This is entirely erroneous.

In the Supreme Court's decision in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), there was no relief whatever granted either by way of injunction or by way of damages. Subsequent thereto the lower courts denied equitable relief, and after damages were awarded on trial the decision was reversed in the Court of Appeals and on November 2, 1977 (Docket No. 77-331) the Supreme Court denied certiorari.

Accordingly, this derivative case is in the identical posture as the Mills derivative case so far as quantum of damage is concerned. However, in the present case relief was granted in establishing the cause of action and the further relief granted of an accounting.

For convenience we reproduce below the final part of Mills v. Electric Auto-Lite Co. (7 Cir., 1977), 552 F.2d 1239, pp. 1249-50:



V

The district court held that plaintiffs should recover their attorneys' fees and other litigation expenses out of the damages which the court awarded them. Since we have found that plaintiffs were treated fairly in the merger and are not entitled to damages, we must face the question of whether and how much they nonetheless should be compensated by Eltra for their fees and expenses.

When this case was before the Supreme Court, the Court held "that petitioners, who have established a violation of the securities laws by their corporation and its officials, should be reimbursed by the corporation or its survivor for the costs of establishing the violation." 396 U.S. at 389, 90 S.Ct. at 624 (footnote omitted). The Court later stated that "[w]hether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute." *Id.* at 396, 90 S.Ct. at 627 (footnotes omitted).

[7] We interpret this language to mean that plaintiffs should recover from Eltra all fees and expenses related to the establishment of a violation of the federal securities laws. This would encompass the litigation through the decision in the Supreme Court. The Court has indicated that the award is not contingent upon the existence of a fund created from any damages eventually awarded the plaintiffs.[18]

give a good approximation of the number of Eltra common shares or their equivalent that the Auto-Lite minority shareholders should have received.

18. In its most recent decision dealing with the issue of fee-shifting, the Court by implication approved its earlier reasoning in *Mills*. *See Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 257-58, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).



The Court left open the question of whether plaintiffs should also be compensated for fees and expenses incurred in a trial and subsequent appeals on the issue of damages, implying that whether or not plaintiffs obtained damages should be a factor in resolving that question. We hold that plaintiffs are not entitled to be compensated for fees and expenses they have incurred since the Supreme Court's decision in this case. In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court held that, absent statutory authority, the only exceptions to the general American rule that a litigant must pay his own fees and expenses are in situations where the litigant confers a common benefit on the class that he represents or where a losing party acts in bad faith. Since the Securities Exchange Act provides no authorization for fee-shifting in this type of case and the bad faith exception is inapposite here, plaintiffs cannot recover fees and expenses unless they demonstrate that their work on the issue of damages produced a common benefit for the former Auto-Lite minority shareholders. Plaintiffs cannot meet this burden. They have conferred no benefit upon the class they represent beyond the "corporate therapeutics" produced by their showing that the proxy statute was violated, and they must pay their own fees and expenses for their unsuccessful attempt to obtain damages for that violation.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

II. The panel stated "Saks is somewhat sui generis because of the fact that there was concealment or nondisclosure of the parent-subsidiary relationship between the parties and there was the clandestine interest of the parent in the independent firm that was eventually disclosed."

What was "clandestine" in this case was the higher prices charged by du Pont to General Motors, and what was "eventually disclosed" as a result of the accounting was du Pont's successful justification of its higher prices, while in actual violation of law and having the stock power to "induce General Motors to favor du Pont, the very result which we found illegal on the first appeal." 366 U.S. 316 at 331 (emphasis added).

Chancellor Seitz in Saks v. Gamble, 38 Del. Ch. 504, 154 A.2d 767 (1958) at 760 stated:

> "However, it does stand undisputed that for the first time the matter has been removed from the area of possible substantial doubt. This is a benefit to the corporation."

Neither General Motors as an entity nor its shareholders ever, until the compulsory accounting

in this case, were advised of these higher prices and higher profit margins which du Pont was compelled (and as it turned out successfully) to justify.

Accordingly, what had been concealed was then "eventually disclosed" in precise terms of Delaware law.

But Delaware Law goes even farther.

The showing of a "meritorious claim" is sufficient, irrespective of whether the claim induces any corporate action or results in relief. The Chancellor so held in Lewis v. Scotten-Dillon Company, (1973) 306 A.2d 755, stating:

> "Under the view I take of the case the central question is whether plaintiff had a 'meritorious claim.' ...In other words, I am unable to find as a fact that the cancellation was induced by the litigation. However, that is not determinative of plaintiff's right to fees; cancellation, if shown, would be but an additional factor in determining the amount of any fee allowed." (at 756, emphasis added).

The Chancellor elaborated on the same page:

"The rules to be applied when compensation is sought in a derivative action were reviewed by the Supreme Court in Chrysler Corporation v. Dann, Del., 223 A.2d 384 (1966). There Chief Justice Wolcott stated that to justify an allowance the action must have had merit at the time it was filed, and plaintiff must have had 'some' factual basis for his charges. He then wrote:

'The crux of the matter is the meaning of the term 'meritorious action.' ...A claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success. It is not necessary that factually there be absolute assurance of ultimate success, but only that there by some reasonable hope.'

See also Palley v. McDonnell Company, Del.Ch., 295 A.2d 762 (1972)."

The final words -- "reasonable hope" -- of Chief Justice Wolcott were re-incorporated by Delaware's Supreme Court in affirmance, (1974) 318 A.2d 134, even if the result "...was not induced by this litigation."

Where, again quoting the words of Delaware's Supreme Court, the complaint herein could and did "...withstand a motion to dismiss..."(Chrysler, supra), it beggars the mind to deny recovery of counsel fees where this Court in 1959 -- nearly 20 years ago -- held on the pleadings that the "question" was "...merely who ought most properly to press [this action] forward" 268 F.2d 194, at 197-198.

The Delaware Supreme Court's affirmance and repetition of the "'reasonable hope' of success" standard (Iroquois Industries Inc. v. Lewis, 318 A.2d 134 (1974)) compels an award under Erie Railroad v. Tompkins, 304 U.S. 64 (1938) and Hausman v. Buckley, (2 Cir., 1962) 696, cert. den., 369 U.S. 885.

It would be irrelevant in this derivative case on behalf of a Delaware corporation if the substantive claims arose under the laws of Australia or Mexico rather than fiduciary and antitrust claims, and we do not read the thunderous mandate of Santa Fe Industries Inc. v. Green,

430 U.S. 462 (1977) as vitiating Erie.

Indeed, the very fact that defendants were compelled to rely upon the not "clearly erroneous" standard in two appeals on the merits in this case is a flat admission by them of liability under Delaware law. 414 F.2d 956, 436 F.2d 1205.

III. As a matter of law, it must be held that General Motors was not an "involuntary" client. General Motors compelled the outside representation. The dates are important. As pointed out in 268 F.2d 194, at 195, General Motors did not attack failure to make demand on the "Board of Directors of General Motors." This was for the obvious reason that General Motors at that very moment, namely June 18, 1959 when this Court's first decision was rendered, at that very time, General Motors was simultaneously continuing to support the proposal in Chicago that would have permitted du Pont to retain its 23% stock interest. For two years until May 22, 1961 when the Supreme Court ordered divestiture 366 U.S. 316, General Motors supported du Pont's continuing stock interest. Since divestiture was not ordered until 1961 and not

completed for several years thereafter, it is plain that General Motors Management made a deliberate decision that plaintiffs were "who ought most properly to press [the case] forward" 268 F.2d at 197-98.

Needless to say, General Motors while arguing for continued ownership by and subservience to du Pont did not hire counsel of the stature of Stanley H. Fuld, Esq. to advise the Board. See Burks v. Lasker (2 Cir., Jan. 11, 1978, Docket No. 77-7060, Slip op. 991-1000).

In the precise terms of Mills, supra, 396 U.S. at 396-397:

> "To award attorney's fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." (Footnote omitted, emphasis added).

As we state on page 3 of our main brief,

> *Simpliciter,* General Motors had victory thrust upon it.
>
> In the face of violation of law, that victory was compulsory judicial accounting for violation of *state* fiduciary obligation and violation of federal antitrust laws in and of themselves, as well as one of the *means* by which *state* law was violated.
>
> Under the "American Rule" General Motors is liable for counsel fees. Under the "American Rule" du Pont is liable for counsel fees, because its violations of law while in a position of power compelled the judicial accounting—the ". . . attack which must be met."

## C O N C L U S I O N

It is respectfully submitted that the Court should rehear this case en banc and should vacate its decision and reverse the decision below.

Respectfully submitted,

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CLERK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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CALLMAN GOTTESMAN and PAUL J. PEYSER,

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GENERAL MOTORS CORPORATION and E.I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees,

Dkt. No. 77-7228

CLENDON H. LEE,

Appellant.

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Before:

HON. WALTER R. MANSFIELD, LEONARD P. MOORE and J. JOSEPH SMITH, Circuit Judges.

New York, N.Y.
January 18, 1978

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Statement made by the court at disposition of appeal in open court.

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We have read the briefs and reread them and we have looked at the record and read Judge Metzner's opinion. This has been an epic case. It has required countless hours of expert professional services by eminent counsel and an enormous outlay in expenses. The services have been rendered over what seems like an interminable period of time, rivaling Jaundice v. Jaundice. I imagine it would have seemed even more interminable 18 years ago if we knew it was going to extend as long as this. There is no question about the fact

that the litigation has involved complex facts and difficult questions of law.

In accordance with our custom, when the rule of law and its applicability to the facts of the case are clear and a written opinion would not contribute anything of precedential value, we are going to dispose of this case now, from the bench. We recognize all of the factors that you and other plaintiffs' counsel have mentioned. We sympathize with your position, in view of all the work you have done. But we feel that we must affirm here essentially for the reasons stated by Judge Metzner in his opinion, because it seems to us that the applicable rule here is the American Rule as it has been explained by the Supreme Court in Alyeska v. Wilderness Society. That Rule requires each litigant to bear his own costs and expenses of litigation, absent some exception permitting recovery from others, such as a statutory authority, the creation of a fund, a contract or agreement for a fee, a showing of bad faith or misconduct on the part of the other side, or a benefit to the client.

Applying these principles here, we find no statutory authority for an award. Section 4 of the Clayton Act entitles a party to recover counsel fees only if there is a recovery of damages and here there was none. We find no benefit to the defendants of a nature that warrants an award of counsel fees. While it may be true that the plaintiffs did succeed in obtaining an accounting from duPont, nothing was found to be due. To recover attorneys fees there must be more than just the clarification of some principle of law. The cases relied upon such as Saks v. Gamble and Mills v. Electro Auto Light are clearly distinguishable. Saks is somewhat sui generis because of the fact that there was

concealment or nondisclosure of the parent-subsidiary relationship between the parties and there was the clandestine interest of the parent in the independent firm that was eventually disclosed. In Mills there was relief granted whereas here there was no relief obtained at all either by way of injunction or by way of damages. We find no basis for an award of attorneys fees to the loser. There is no showing of bad faith on the part of the defendants, no agreement that covers an award of a fee regardless of how the case might come out, and no creation of a common fund.

Absent some exception to the American Rule that would entitle counsel here to a fee, we must affirm, as I said, essentially for the reasons stated by Judge Metzner in his opinion.

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April 14, 1978

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Re: Gottesman v. General Motors
Docket Nos. 77-7228
77-7428

Gentlemen:

I serve two copies of Appellant Lee's Petition for Rehearing, etc. upon each of you.

Very truly yours,

Clendon H. Lee

CHL:cp

enclosures